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Brief of McCaleb for P. C. (m
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Filed Feb. 17, 1899.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. ——.

GEORGE LHOTE, PLAINTIFF IN ERROR,

versus

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

CHURCH EXTENSION SOCIETY OF THE METHODIST EPISCOPAL CHURCH, INTERVENOR, PLAINTIFF IN ERROR.

Brief for Plaintiffs in Error, on Motion to Dismiss or Affirm.

E. HOWARD McCALEB.

A. W. HYATT STAT'Y MFG. CO., LTD., N. O.—80,062.

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The General Assembly of the State of Louisiana passed Act No. 45, approved July 7th, 1896, entitled "An act to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof," etc. By the 15th section of this statute, it is provided that: "The Council shall also have power, * * * (11) to regulate the police of * * * houses of prostitution and assignation, and to close such houses from certain limits, and shall have power to exclude the same, and to close houses and places for the sale of intoxicating liquors when the public safety may require it, and to authorize the mayor and police to close such places."

The Common Council of the city of New Orleans, claiming to act under the power conferred by this statute, on the 29th of July, 1897, enacted Ordinance No. 13,082, C. S., which, in its first section, locates the limits within which lewd women may dwell, and excludes them from other portions of the city. The

section makes its unlawful for any person to rent, lease or hire any house, building or room to any woman or girl notoriously abandoned to lewdness, or for immoral purposes, outside the limits specified in section one. The fifth section provides that it shall be unlawful for any party or parties to establish or carry on a house of prostitution or assignation without the limits specified in section one. The sixth section authorizes the mayor to order the occupants of said houses, buildings or rooms to remove within a delay of five days by service of notice upon the occupants in person, or by posting the notice on the door of the house, etc. By the seventh section it is provided that, in the event of the refusal of such occupants of such houses to remove, the mayor is authorized to place a policeman at the door of such premises to warn away all parties who shall undertake to enter. The eighth section provides for the punishment of these people who violate the provisions of the ordinance, or who disturb the tranquility of the neighborhood, by fine, to be imposed by the recorder of the city.

By a subsequent ordinance, No. 13,485, C. S., the limits designated were changed.

George Lhote, whose residence is situated within the new limits thus designated for lewd women, and in the square bounded by St. Louis, Franklin, Treme and Toulouse streets, second district of New Orleans, sued out a writ of injunction in the Civil District Court for the Parish of Orleans, Louisiana, to prevent the execution of the ordinances, above referred to. Among other things, he averred "that the enforcement of said ordinances in the manner provided therein, violates the Constitution of the United States and the laws of this State, in that they deprive petitioner of his property without due process of law, and amount to a taking or damaging the property of petitioner for public purposes without just and adequate compensation being first paid. That said ordinances are illegal, unreasonable and oppressive, in that, if executed, they will render your petitioner's dwelling house, and those of his neighbors, unfit and unsuitable for the occupancy of their families, wives and children, and wholly valueless for the purposes for which they were constructed, and have heretofore been used."

The Church Extension Society of the Methodist Episcopal Church filed its petition of intervention, averring that it is a corporation organized under the laws of the State of Pennsylvania, owning two lots of ground on which is situated a building occupied for church purposes, wherein a colored congregation, composed of some six hundred members, worship and assemble on each and every Sabbath, and on Tuesday and Friday evenings, as well as on other stated occasions. That besides the religious services conducted in said church, a Sunday school is organized and established, which is attended by one hundred and seventy children, who receive religious instructions and teachings. It joined the plaintiff in injunction, alleging that said ordinances violate the provision of the Constitution of the United States, and demanded that they be declared unconstitutional. By a subsequent petition, the Church Extension Society more specifically enumerated the injury and damage to its property by the location of lewd and abandoned women in its vicinity.

In the Civil District Court for the Parish of Orleans judgment was rendered, perpetuating the injunction sued out by the plaintiff and dismissing the intervention of the Church Extension Society. The opinion of the court will be found in the record.

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In the State Supreme Court the case was argued and submitted on April 20, 1898, and held under advisement until November 21st, 1898, before it was decided.

The State Supreme Court, in its opinion, among other things, say:

"It does not, however, readily occur to the mind that confining houses of this character within certain limits by the appropriate ordinance, is violative of any of the constitutional guarantees invoked in the discussion before us." The opinion further

holds that, "to whatever extent, however, the right of private property may be deemed affected by this last ordinance, it must be borne in mind that it is a great power of government given to preserve the morals, health and lives of the community that requires the surrender of rights by the citizen, supposed to be exacted by this ordinance. To that police power all must yield obedience. As put in the text-books and enforced by all decisions: 'Every citizen holds his property subject to the proper exercise of the police power exerted either by the legislature or by the subordinate political corporations. It is settled that police laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not expropriate property for public use. If the individual sustains any injury it is deemed *damnum absque injuria*, or, in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve.'"

The decree of the Supreme Court reversed the judgment of the lower court in favor of plaintiff, dissolved the injunction and dismissed his suit, and affirmed the judgment of the lower court dismissing the intervention, and granting the injunction issued on the prayer of the Church Extension Society of the Methodist Episcopal Church.

A rehearing was applied for, which was refused, and, thereupon, the plaintiff, George Lhote, and the intervenor, the Church Extension Society of the Methodist Episcopal Church, sued out this writ of error, claiming rights protected and secured under the Constitution of the United States, especially the Fourteenth Amendment thereof.

They assign as error:

"1. That the court erred in holding that the Ordinances Nos. 13,032 and 13,485, Council Series, of the city of New Orleans, do not deprive plaintiff and intervenor of the equal protection of the law.

"2. The court erred in refusing to hold that the said ordinances and the power conferred upon the mayor of the city of New Orleans thereby was not due process of law.

"3. The court erred in holding that the said Ordinances Nos. 13,032 and 13,485, Council Series, of the city of New Orleans, did not deprive the plaintiff and intervenor of their property without due process of law.

"4. That the court erred in holding that said ordinances

were enacted under the police power of the city of New Orleans and the injuries suffered by plaintiff and intervenor were *damnum absque injuria.*

"5. That the court erred in refusing to hold that the ordinances attacked make arbitrary and unjust discriminations against intervenors, who belong to the colored race.

"6. That the court erred in extending the police power of the city of New Orleans so as to violate rights guaranteed by the Constitution of the United States, the supreme law of the land.

"7. The court erred in refusing to hold that the Ordinances, 13,032 and 13,485, Council Series, of the city of New Orleans, violate the 14th amendment to the Constitution of the United States.

"8. That the court erred in rendering a decree and entering judgment herein in favor of defendants and against plaintiff and intervenor." See Record.

ON MOTION TO DISMISS.

The undersigned, before the return day of the record to this court, and before the same was filed here or printed, was served with a motion "to dismiss the writ of error in the above entitled cause, for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit: The Supreme Court of the State of Louisiana, and because, although the record in the said cause may show that this court has jurisdiction in the premises, yet, it is manifest, that said appeal was taken for delay only."

In other words, a motion is made to dismiss the writ of error for want of jurisdiction, and in the very next breath it is admitted that this court has jurisdiction. The motion to dismiss is *frivolous* upon its face.

Ever since the passage of the judiciary act of 1789, this Court has been vested with jurisdiction to review a final judgment or decree in any suit in the highest court of a State where is drawn in question the validity of or an authority exercised under any State, on the ground of there being repugnant to the Constitution or laws of the United States, and the decision is in favor of their validity (section 709, R. S., U. S.); or where any right, or immunity is claimed under the Constitution of the

United States, and the decision is against the right set up or claimed by either party under such Constitution, and this court is vested with power to re-examine, reverse or affirm upon a writ of error.

Upon face of the record there can be no doubt that a federal question was raised in the pleadings, decided by the highest court of the State, and a writ of error allowed by the Chief Justice of the Supreme Court of Louisiana from this decision.

Under the rule allowing a motion to affirm to be united with a motion to dismiss, a motion to affirm cannot be entertained unless there appears on the record *some color of right to a dismissal.* Richards vs. Mackall, 113 U. S. 539; Whitney vs. Cook, 97 U. S. 607; Metcalfe vs. The Alaska, 130 U. S. 201.

ON MOTION TO AFFIRM.

I.

The Fourteenth Amendment was primarily intended to secure the rights and the equality before the law of the colored race. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them, exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. Strauder vs. West Virginia, 100 U. S. 303.

An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery. Slaughter House Case, 16 Wall. 36.

Now, it appears that the congregation composing the Church Extension Society, and the children attending the Sunday school in this church, within the limits established for lewd women by the ordinance in question, all belong to the colored race, and although the church is the property of a corporation, it has been held that the word "person" used in the Fourteenth Amendment includes a corporation. Santa Clara Co. vs. Southern Pacific Co., 118 U. S. 394.

(*a*) The ordinance in question denies to plaintiff and intervenor the equal protection of the laws; thus, the owner of property within the limits, can validly lease the same for purposes of prostitution.

By section one of the Ordinance No. 13,032, the prohibition to rent, lease or hire any house, building or room, is directed exclusively against persons outside of the limits specified in section one. Not only can the owners of the property within the limits lease their houses, rooms and buildings for immoral purposes, but under the decision rendered by the Supreme Court of Louisiana in Lyman vs. Townsend, 24 An. 525, they can enforce the payment of their rent. In that case the court held that:

"A person owning a house in the vicinity of New Orleans situated *within the limits* of the district where the keeping of houses of prostitution are allowed by the city, may lease his house for that purpose and recover the rent from the lessee. In such a case, the lessee cannot be permitted to plead the immorality of her own calling as a shield against the payment of the rent of the property which she has used."

Whereas, the property owner beyond the limits cannot make or enforce any such contract.

(*b*) Outside of the limits designated for lewd women the keeping of houses of prostitution is forbidden under severe penalties, whereas within the limits the lewd and abandoned can ply their vocation with impunity. See State of Louisiana vs. Mack, 41 An. 1079. In other words, it is made a penal offense for prostitutes "to live, move or have their being" outside of the limits assigned, while within this "charmed circle" they can ply their nefarious vocation *ad libitum*.

II.

The powers conferred upon the mayor by this ordinance are of the most extraordinary character. They cannot be called "due process of law," for they authorize him to act, direct prostitutes to remove within a delay of five days, close up the house, building or room, and place a policeman at the door of such premises to warn away all parties who undertake to enter.

The State of California attempted under her so-called "police power" to exclude lewd and debauched women from being brought into the State by vessels coming from any foreign port, and directed the Commissioner of Immigration to exclude such women unless the captain of the vessel gave a bond of $500.00, that such passenger should not become a public charge, or is a convicted criminal or is a lewd and debauched woman. This Court did not hesitate to declare this statute a violation of the Federal Constitution. Chy Lung vs. Freeman, 92 U. S. 275.

The extraordinary powers conferred upon the mayor by the ordinance in question is not "due process of law."

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential."

Black's Constitutional Law, p. 481, § 212.

In Pennoyer vs. Neff, 95 U. S. 715, this Court say the term "due process of law," when applied to judicial proceedings, means a course of legal proceedings, according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a competent tribunal to pass upon the subject-matter.

Here, the poor prostitute is not given a hearing or allowed a trial, but is turned over to the tender mercies of the mayor and his band of janizaries—the police—to be disposed of as, in their judgment, they may see fit. Nor are owners of property within the limits for lewd women in any better condition. Their property is taken without due process of law.

"The constitutional guaranty that no person shall be deprived of his property without due process of law, may be violated without the physical taking of the property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use and essential characteristics and attributes, without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of the essential attributes, deprives the owner of his property." Black's Constitutional Law, p. 484.

All of these extraordinary and unconstitutional proceedings are attempted to be justified upon the theory that every citizen holds his property subject to the proper exercise of the police power.

The Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any State deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." To escape from the prohibitions contained in the provisions of the Federal Constitution, we are told that the city of New Orleans, acting as an agent of the State, *can*, under its indefinable police power, invade the sacred rights of property, render plaintiff's residence and intervenor's church totally unfit for purposes for which they were erected, turn the plaintiff and his family out of their home, and the congregation of the church out of its sanctuary, by placing them within the limits where lewd women are compelled to dwell, and ply their vocation.

We contend that the city of New Orleans, in dedicating the area prescribed in the ordinance for the residence of bawds and prostitutes, infringes plaintiff's and intervenor's rights of property.

"There may be a *taking* of property within the *spirit* as well as within the strict letter of the Constitution, where the injury is a mere result of the use of other property under a legislative grant. But I understand the rule to be, that when, by the use of adjoining property, for the purposes contemplated by the grant, the property of others is directly invaded by some physical agency that produces an actual physical invasion of the property

over which it passes, or is sent, and thereby impairs the use of the property, that this is a *taking* of property which entitles the owner of the property injured to compensation, even if the invasion and damage is only occasional. But where the injury is a *remote* consequence of the act, and not a direct or necessary result, and does not operate as a physical interference with property, or impose upon it an onerous servitude, and only occurs at intervals, it is strictly consequential damage that cannot be the subject of an action."

Wood on the Law of Nuisances, section 595.

"If property in land consists in certain essential rights, and a physical interference with the land subverts one of those rights, such interference takes, '*pro tanto*,' the owner's property. The right of indefinite user is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. Use is the real side of property. Eaton vs. Boston, Concord & Montreal Railroad, 51 N. H.

"As to the ownership of the soil of the street, the question is of no practical importance. The right of an owner of a lot in a town to the use of an adjoining street, *is as much property* as the lot itself, and the legislature can no more deprive a man of one than the other, without compensation." Lackland vs. R. R. Co., 31 Mo. 180.

"A municipal corporation is liable to indictment for a public nuisance maintained by it, and is also liable for damages at the suit of an individual who sustains a special damage therefrom. * * * If it neglects nuisances injurious to the health or morals of its citizens, which it has the power to remove, or if it permits any public nuisance to exist upon its property, it may be indicted and punished the same as an individual." Wood on Nuisances, section 743.

"When a municipal corporation has ample power to remove a nuisance that is injurious to the health (or morals), endangers the safety, or impairs the convenience of its citizens, or when, in the prosecution of a public work, it creates a nuisance, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it, and for injuries resulting from its wrongful acts. *Idem*, 744.

"It may not always be easy to determine what really amounts to a *taking* of property, but it is safe to say that, whenever the exercise of the right operates to destroy an easement incident to real property, or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, that is a taking of property. There need not be an exclusive appropriation of the property, but such an

interference with the beneficial use thereof, as operates an essential abridgement of the owner's rights incident to, and an essential part of, the estate." *Idem*, 755.

In Pumpelly vs. Green Bay Co., 13 Wall., p. 166, this Court said:

"It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a *taking*, within the meaning of the Constitution."

III.

But it is said that the city exercises this peculiar governmental function by virtue of its unlimited, indefinable police power.

The police power does not extend to the supervision, regulation and inspection of prostitutes. The city of New Orleans has no lawful authority to regulate prostitution.

"Police supervision of prostitutes, so universal a custom in the European cities, is sometimes considered in the same light, but is essentially different. Prostitution is an offense against the law, and these city ordinances render lawful the practice of authorizing its prosecution under certain limitations and restrictions, among which are police supervision and inspection. But the subjection to this control is voluntary on the part of the prostitutes, in order to render practices lawful which are otherwise unlawful. It is rather in the character of a license, under certain restraints, to commit an offense against public morality." Tiedman's Limitations of Police Power, p. 131, paragraph 49.

"The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality and banishing vice and sin from the world." *Idem*, p. 150.

"It has been maintained in a previous section that police power does not extend to the punishment of vice. No law can make vice a crime, unless it becomes, by its consequence, a trespass upon the rights of the public. But while this may be true, no man can claim the right to make a trade of vice. A business that panders to vice may and should be strenuously prohibited, if possible. Fornication is a most grievous and common vice. Under this view of all the limitations of po-

lice power, it would be commendable as well as permissible to prohibit the keeping of houses of ill-fame. * * * Vice as vice is not subject to police regulations, but a business may always be prohibited whose object is to furnish means for the indulgence of a vicious propensity or desire." *Idem*, p. 391, paragraph 102.

Fortunately for us, this court has put a limit even upon the police power exercised by a State, or a municipality created by it.

In the case of the New Orleans Gas Light Company vs. Louisiana Light Company, 115 U. S. 650, it was distinctly asserted that:

"Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land;" and the court referred to the cases of Henderson & Co. vs. Mayor of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U. S. 275; and R. R. vs. Husen, 95 U. S. 465.

"If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Mulger vs. Kansas, 123 U. S. 661.

"The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby." Walling vs. Michigan, 116 U. S. 446. See, also, Scott vs. Donald, 165 U. S. 58.

The State cannot under the exercise of its police power obstruct or interfere with foreign or interstate commerce, nor can it impair the obligation of contracts, nor deprive any one of his property without due process of law, nor deny to any one within its jurisdiction the equal protection of the laws.

IV.

The testimony is conclusive that the enforcement of this ordinance will disturb and render plaintiff's and intervenor's properties wholly unfit for the purposes for which they were erected. Worse than this, to recognize the right of the city to create an asylum for abandoned women, and to dedicate a por-

tion of her territory for the residence of this class of people and to permit them to there ply their unholy vocation, is a violation of the principles of the Christian religion, which the Supreme Court of the United States say is the foundation of our government and the civilization which it has produced in the Western world.

"The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of the Christianity and of the civilization of the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself, and whether the funds accumulated for that purpose shall be restored to the same unlawful uses heretofore, to the detriment of the true interests of civil society." Mormon Church vs. United States, 136 U. S. 49.

"A house of ill-fame or bawdy house, as it is more commonly called in the law, is a public nuisance, and the keeper thereof may be indicted therefor whether the house is located in a city or a forest. It is *mala in se*, and the court does not need to be informed of its effects upon society, for the common experience of mankind shows that the proper and natural consequences of such an establishment will be detrimental to the morals and social welfare of the public." Wood on Nuisances, section 29.

"No nuisance, whose effect is merely moral, can be abated, except by the courts and by the courts only, by the administration of such punishment as will be likely to cause the parties to desist. It is very laudable on the part of the people, in any community, to desire to be rid of these moral pests, and the indignation experienced by them at the presence of such institutions in their midst is just; but they will not be justified in attempting to check the evil by any riotous or unlawful means." *Idem*, section 32.

In the cases of Ely vs. the Supervisors of Niagara Co., 36 N. Y. 297, and in Welch vs. Stowell, 2 Douglas (Mich.), 332, it was held that "individuals have not the right to abate a nuisance resulting from the keeping of a bawdy house by demolishing the buildings, or otherwise interfering therewith; that the remedy is by indictment."

We, therefore, seriously maintain: (1st) that the ordinance complained of denies to plaintiff and intervenor the equal pro-

tection of the laws. Immoral contracts and immoral persons are permitted in one portion of the city of New Orleans, and prohibitd in the others (Yick Wo vs. Hopkins, 118 U. S. 356). (2d) The ordinance attacked makes arbitrary and unjust discriminations against intervenors, who belong to the colored race—their church, and their church alone is subjected to the contamination of lewdness and immorality, while all the white churches in the city are exempted from such burdens. (3d) It give to the mayor and police extraordinary powers to arrest and condemn without hearing or trial. (4th) It deprives plaintiff and intervenor of their property, by destroying the use for which they were constructed, "without compensation" and without "due process of law." (5th) It authorizes the city of New Orleans to license, create and maintain public brothels within the area designated, and denies to plaintiff and intervenor the right to have such nuisances removed or abated, by the preventive writ of injunction. High on Injunctions, §782; Hamilton vs. Whitridge, 11 Md. 128. (6th) It extends the *police power*, so as to violate rights guaranteed or secured by the Constitution of the United States—the supreme law of the land. (7th) Instead of prohibiting and suppressing, it tolerates and regulates vice.

Respectfully submitted,

E. HOWARD McCALEB.

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IN THE

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No. [illegible]

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Brief for Plaintiffs in Error.

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The General Assembly of the State of Louisiana passed Act No. 45, approved July 7th, 1896, entitled "An act to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof," etc. By the 15th section of this statute, it is provided that: "The Council shall also have power, * * * (11) to regulate the police of * * * houses of prostitution and assignation, and to close such houses from certain limits, and shall have power to exclude the same, and to close houses and places for the sale of intoxicating liquors when the public safety may require it, and to authorize the mayor and police to close such places."

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abandoned to lewdness, or for immoral purposes, outside the limits specified in section one. The fifth section provides that it shall be unlawful for any party or parties to establish or carry on a house of prostitution or assignation without the limits specified in section one. The sixth section authorizes the mayor to order the occupants of said houses, buildings or rooms to remove within a delay of five days by service of notice upon the occupants in person, or by posting the notice on the door of the house, etc. By the seventh section it is provided that, in the event of the refusal of such occupants of such houses to remove, the mayor is authorized to place a policeman at the door of such premises to warn away all parties who shall undertake to enter. The eighth section provides for the punishment of these people who violate the provisions of the ordinance, or who disturb the tranquility of the neighborhood, by fine, to be imposed by the recorder of the city. R., pp. 6 and 7.

By a subsequent ordinance, No. 13,485, C. S., the limits designated where changed. R., p. 5.

George Lhote, whose residence is situated within the new limits thus designated for lewd women, and in the square bounded by St. Louis, Franklin, Tremé and Toulouse streets, second district of New Orleans, sued out a writ of injunction in the Civil District Court for the Parish of Orleans, Louisiana, to prevent the execution of the ordinances, above referred to. Among other things, he averred "that the enforcement of said ordinances in the manner provided therein, violates the Constitution of the United States and the laws of this State, in that they deprive petitioner of his property without due process of law, and amount to a taking or damaging the property of petitioner for public purposes without just and adequate compensation being first paid. That said ordinances are illegal, unreasonable and oppressive, in that, if executed, they will render your petitioner's dwelling house, and those of his neighbors, unfit and unsuitable for the occupancy of their families, wives and children, and wholly valueless for the purposes for which they were constructed, and have heretofore been used." R., pp. 3 and 4.

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"It does not, however, readily occur to the mind that confining houses of this character within certain limits by the appropriate ordinance, is violative of any of the constitutional guarantees invoked in the discussion before us." The opinion further

holds that, "to whatever extent, however, the right of private property may be deemed affected by this last ordinance, it must be borne in mind that it is a great power of government given to preseve the morals, health and lives of the community that requires the surrender of rights by the citizen, supposed to be exacted by this ordinance. To that police power all must yield obedience. As put in the text-books and enforced by all decisions: 'Every citizen holds his property subject to the proper exercise of the police power exerted either by the legislature or by the subordinate political corporations. It is settled that police laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not expropriate property for public use. If the individual sustains any injury it is deemed *damnum absque injuria*, or, in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve.'" R. p. 124, *et seq.*

The decree of the Supreme Court reversed the judgment of the lower court in favor of plaintiff, dissolved the injunction and dismissed his suit, and affirmed the judgment of the lower court dismissing the intervention, and granting the injunction issued on the prayer of the Church Extension Society of the Methodist Episcopal Church. R. p. 129.

A rehearing was applied for, which was refused, and, thereupon, the plaintiff, George Lhote, and the intervenor, the Church Extension Society of the Methodist Episcopal Church, sued out this writ of error, claiming rights protected and secured under the Constitution of the United States, especially the Fourteenth Amendment thereof.

They assign as error:

"1. That the court erred in holding that the Ordinances Nos. 13,032 and 13,485, Council Series, of the city of New Orleans, do not deprive plaintiff and intervenor of the equal protection of the law.

"2. The court erred in refusing to hold that the said ordinances and the power conferred upon the mayor of the city of New Orleans thereby was not due process of law.

"3. The court erred in holding that the said Ordinances Nos. 13,032 and 13,485, Council Series, of the city of New Orleans, did not deprive the plaintiff and intervenor of their property without due process of law.

"4. That the court erred in holding that said ordinances were enacted under the police power of the city of New Orleans and the injuries suffered by plaintiff and intervenor were *damnum absque injuria.*

"5. That the court erred in refusing to hold that the ordinances attacked make arbitrary and unjust discriminations against intervenors, who belong to the colored race.

"6. That the court erred in extending the police power of the city of New Orleans so as to violate rights guaranteed by the Constitution of the United States, the supreme law of the land.

"7. The court erred in refusing to hold that the Ordinances, 13,032 and 13,485, Council Series, of the city of New Orleans, violate the 14th amendment to the Constitution of the United States.

"8. That the court erred in rendering a decree and entering judgment herein in favor of defendants and against plaintiff and intervenor." See Record, pp. 133 and 134.

I.

The Fourteenth Amendment was primarily intended to secure the rights and the equality before the law of the colored race. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them, exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. Strauder vs. West Virginia, 100 U. S. 303.

An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery. Slaughter House Case, 16 Wall. 36.

Now, it appears that the congregation composing the Church Extension Society, and the children attending the Sunday school in this church, within the limits established for lewd women by the ordinance in question, all belong to the colored race, and although the church is the property of a corporation, it has been held that the word "person" used in the Fourteenth Amendment includes a corporation. Santa Clara Co. vs. Southern Pacific Co., 118 U. S. 394.

(*a*) The ordinance in question denies to plaintiff and intervenor the equal protection of the laws; thus, the owner of property within the limits, can validly lease the same for purposes of prostitution.

By section one of the Ordinance No. 13,032, the prohibition to rent, lease or hire any house, building or room, is directed exclusively against persons outside of the limits specified in section one. Not only can the owners of the property within the limits lease their houses, rooms and buildings for immoral purposes, but under the decision rendered by the Supreme Court of Louisiana in Lyman vs. Townsend, 24 An. 525, they can enforce the payment of their rent. In that case the court held that:

"A person owning a house in the vicinity of New Orleans situated *within the limits* of the district where the keeping of houses of prostitution are allowed by the city, may lease his house for that purpose and recover the rent from the lessee. In such a case, the lessee cannot be permitted to plead the immorality of her own calling as a shield against the payment of the rent of the property which she has used."

Whereas, the property owner beyond the limits cannot make or enforce any such contract.

(*b*) Outside of the limits designated for lewd women the keeping of houses of prostitution is forbidden under severe penalties, whereas within the limits the lewd and abandoned can ply their vocation with impunity. See State of Louisiana vs. Mack, 41 An. 1079. In other words, it is made a penal offense for pros-

titutes "to live, move or have their being" outside of the limits assigned, while within this "charmed circle" they can ply their nefarious vocation *ad libitum*

II.

The powers conferred upon the mayor by this ordinance are of the most extraordinary character. They cannot be called "due process of law," for they authorize him to act, direct prostitutes to remove within a delay of five days, close up the house, building or room, and place a policeman at the door of such premises to warn away all parties who undertake to enter.

The State of California attempted under her so-called "police power" to exclude lewd and debauched women from being brought into the State by vessels coming from any foreign port, and directed the Commissioner of Immigration to exclude such women unless the captain of the vessel gave a bond of $500.00, that such passenger should not become a public charge, or is a convicted criminal or is a lewd and debauched women. This Court did not hesitate to declare this statute a violation of the Federal Constitution. Chy Lung vs. Freeman, 92 U. S. 275.

The extraordinary powers conferred upon the mayor by the ordinance in question is not "due process of law."

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential."

Black's Constitutional Law, p. 481, § 212.

In Pennoyer vs. Neff, 95 U. S. 715, this Court say the term "due process of law," when applied to judicial proceedings, means a course of legal proceedings, according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a competent tribunal to pass upon the subject-matter.

Here, the poor prostitute is not given a hearing or allowed

a trial, but is turned over to the tender mercies of the mayor and his band of janizaries—the police—to be disposed of as, in their judgment, they may see fit. Nor are owners of property within the limits for lewd women in any better condition. Their property is taken without due process of law.

"The constitutional guaranty that no person shall be deprived of his property without due process of law, may be violated without the physical taking of the property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use and essential characteristics and attributes, without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of the essential attributes, deprives the owner of his property." Black's Constitutional Law, p. 484.

All of these extraordinary and unconstitutional proceedings are attempted to be justified upon the theory that every citizen holds his property subject to the proper exercise of the police power.

The Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any State deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." To escape from the prohibitions contained in the provisions of the Federal Constitution, we are told that the city of New Orleans, acting as an agent of the State, *can*, under its indefinable police power, invade the sacred rights of property, render plaintiff's residence and intervenor's church totally unfit for purposes for which they were erected, turn the plaintiff and his family out of their home, and the congregation of the church out of its sanctuary, by placing them within the limits where lewd women are compelled to dwell and ply their vocation.

We contend that the city of New Orleans, in dedicating the area prescribed in the ordinance for the residence of bawds and prostitutes, infringes plaintiff's and intervenor's rights of property.

"There may be a *taking* of property within the *spirit* as well as within the strict letter of the Constitution, where the injury is a mere result of the use of other property under a legislative grant. But I understand the rule to be, that when, by the use of adjoining property, for the purposes contemplated by the grant, the property of others is directly invaded by some physical agency that produces an actual physical invasion of the property over which it passes, or is sent, and thereby impairs the use of the property, that this is a *taking* of property which entitles the owner of the property injured to compensation, even if the invasion and damage is only occasional. But where the injury is a *remote* consequence of the act, and not a direct or necessary result, and does not operate as a physical interference with property, or impose upon it an onerous servitude, and only occurs at intervals, it is strictly consequential damage that cannot be the subject of an action."

Wood on the Law of Nuisances, section 595.

"If property in land consists in certain essential rights, and a physical interference with the land subverts one of those rights, such interference takes, '*pro tanto*,' the owner's property. The right of indefinite user is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. Use is the real side of property." Eaton vs. Boston, Concord & Montreal Railroad, 51 N. H.

"As to the ownership of the soil of the street, the question is of no practical importance. The right of an owner of a lot in a town to the use of an adjoining street, *is as much property* as the lot itself, and the legislature can no more deprive a man of one than the other, without compensation." Lackland vs. R. R. Co., 31 Mo. 180.

"A municipal corporation is liable to indictment for a public nuisance maintained by it, and is also liable for damages at the suit of an individual who sustains a special damage therefrom. * * * If it neglects nuisances injurious to the health or morals of its citizens, which it has the power to remove, or if it permits any public nuisance to exist upon its property, it may be indicted and punished the same as an individual." Wood on Nuisances, section 743.

"When a municipal corporation has ample power to remove a nuisance that is injurious to the health (or morals), endangers the safety, or impairs the convenience of its citizens, or when, in the prosecution of a public work, it creates a nuisance, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it, and for injuries resulting from its wrongful acts." *Idem*, 744.

"It may not always be easy to determine what really amounts to a *taking* of property, but it is safe to say that, whenever the exercise of the right operates to destroy an easement incident to real property, or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, that is a taking of property. There need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof, as operates an essential abridgement of the owner's rights incident to, and an essential part of, the estate." *Idem*, 755.

In Pumpelly vs. Green Bay Co., 13 Wall., p. 166, this Court said:

"It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a *taking*, within the meaning of the Constitution."

III.

But it is said that the city exercises this peculiar governmental function by virtue of its unlimited, indefinable police power.

The police power does not extend to the supervision, regulation and inspection of prostitutes. The city of New Orleans has no lawful authority to regulate prostitution.

"Police supervision of prostitutes, so universal a custom in the European cities, is sometimes considered in the same light, but is essentially different. Prostitution is an offense against the law, and these city ordinances render lawful the pratice of authorizing its prosecution under certain limitations and restrictions, among which are police supervision and inspection. But the subjection to this control is voluntary on the part of the prostitutes, in order to render practices lawful which are otherwise unlawful. It is rather in the character of a license, under certain restraints, to commit an offense against public morality." Tiedman's Limitations of Police Power, p. 131, paragraph 49.

"The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality and banishing vice and sin from the world." *Idem*, p. 150.

"It has been maintained in a previous section that police power does not extend to the punishment of vice. No law

can make vice a crime, unless it becomes, by its consequence, a trespass upon the rights of the public. But while this may be true, no man can claim the right to make a trade of vice. A business that panders to vice may and should be strenuously prohibited, if possible. Fornication is a most grievous and common vice. Under this view of all the limitations of police power, it would be commendable as well as permissible to prohibit the keeping of houses of ill-fame. * * * Vice as vice is not subject to police regulations, but a business may always be prohibited whose object is to furnish means for the indulgence of a vicious propensity or desire." *Idem*, p. 391, paragraph 105.

Fortunately for us, this court has put a limit even upon the police power exercised by a State, or a municipality created by it.

In the case of the New Orleans Gas Light Company vs. Louisiana Light Company, 115 U. S. 650, it was distinctly asserted that: "Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land;" and the court referred to the cases of Henderson & Co. vs. Mayor of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U. S. 275; and R. R. vs. Husen, 95 U. S. 465.

"If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Mulger vs. Kansas, 123 U. S. 661.

"The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby." Walling vs. Michigan, 116 U. S. 446. See, also, Scott vs. Donald, 165 U. S. 58.

The State cannot under the exercise of its police power obstruct or interfere with foreign or interstate commerce, nor can it impair the obligation of contracts, nor deprive any one of his property without due process of law, nor deny to any one within its jurisdiction the equal protection of the laws.

IV.

The testimony is conclusive that the enforcement of this ordinance will disturb and render plaintiff's and intervenor's properties wholly unfit for the purposes for which they were erected. Worse than this, to recognize the right of the city to create an asylum for abandoned women, and to dedicate a portion of her territory for the residence of this class of people and to permit them to there ply their unholy vocation, is a violation of the principles of the Christian religion, which the Supreme Court of the United States say is the foundation of our government and the civilization which it has produced in the Western world.

"The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of the Christianity and of the civilization of the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself, and whether the funds accumulated for that purpose shall be restored to the same unlawful uses heretofore, to the detriment of the true interests of civil society." Mormon Church vs. United States, 136 U. S. 49.

"A house of ill-fame or bawdy house, as it is more commonly called in the law, is a public nuisance, and the keeper thereof may be indicted therefor whether the house is located in a city or a forest. It is *mala in se*, and the court does not need to be informed of its effects upon society, for the common experience of mankind shows that the proper and natural consequences of such an establishment will be detrimental to the morals and social welfare of the public." Wood on Nuisances, section 29.

"No nuisance, whose effect is merely moral, can be abated, except by the courts and by the courts only, by the administration of such punishment as will be likely to cause the parties to desist. It is very laudable on the part of the people, in any community, to desire to be rid of these moral pests, and the indignation experienced by them at the presence of such institutions in their midst is just; but they will not be justified in attempting to check the evil by any riotous or unlawful means." *Idem*, section 32.

In the cases of Ely vs. the Supervisors of Niagara Co., 36

N. Y. 297, and in Welch vs. Stowell, 2 Douglas (Mich.), 332, it was held that "individuals have not the right to abate a nuisance resulting from the keeping of a bawdy house by demolishing the buildings, or otherwise interfering therewith; that the remedy is by indictment."

We, therefore, seriously maintain: (1st) that the ordinance complained of denies to plaintiff and intervenor the equal protection of the laws. Immoral contracts and immoral persons are permitted in one portion of the city of New Orleans, and prohibited in the others (Yick Wo vs. Hopkins, 118 U. S. 356). (2d) The ordinance attacked makes arbitrary and unjust discriminations against intervenors, who belong to the colored race—their church, and their church alone is subjected to the contamination of lewdness and immorality, while all the white churches in the city are exempted from such burdens. (3d) It gives to the mayor and police extraordinary powers to arrest and condemn without hearing or trial. (4th) It deprives plaintiff and intervenor of their property, by destroying the use for which they were constructed, "without compensation" and without "due process of law." (5th) It authorizes the city of New Orleans to license, create and maintain public brothels within the area designated, and denies to plaintiff and intervenor the right to have such nuisances removed or abated, by the preventive writ of injunction. High on Injunctions, § 782; Hamilton vs. Whitridge, 11 Md. 128. (6th) It extends the *police power*, so as to violate rights guaranteed or secured by the Constitution of the United States—the supreme law of the land. (7th) Instead of prohibiting and suppressing, it tolerates and regulates vice.

Respectfully submitted,

E. HOWARD McCALEB.